APPENDIX A

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 383—September Term, 1965.

(Argued May 31, 1966 Decided July 25, 1966.)

Docket No. 30222

PUBLISHERS' ASSOCIATION OF NEW YORK CITY, HEARST CONSOLIDATED PUBLICATIONS, INC., NEWSPAPER ENTERPRISES, INC., LONG ISLAND DAILY PRESS PUBLISHING CO., INC., NEW YORK WORLD TELEGRAM CORP., NEWS SYNDICATE CO., INC., and THE NEW YORK TIMES COMPANY,

Petitioners,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent,

NEW YORK TYPOGRAPHICAL UNION NO. 6,

Intervenor.

Before:

MOORE, SMITH and KAUFMAN,

Circuit Judges.

Petition by Publishers' Association of New York City and individual members to review and set aside order of the National Labor Relations Board, finding each publisher in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, and requiring each publisher to cease refusing to bargain with intervenor union, etc., and cross-petition of Board for enforcement.

Petition to review denied, enforcement ordered.

JOHN R. SCHOEMER, JR., New York, N. Y. (Townley, Updike, Carter & Rodgers, New York, N. Y., on the brief), *for petitioners.*

SOLOMON I. HIRSH, Attorney, National Labor Relations Board, Washington, D. C. (Arnold Ordman, General Counsel, Dominick L. Manoli, Associate General Counsel, Marcel Mallet-Prevost, Asst. General Counsel, and George H. Cohen, Attorney, National Labor Relations Board, on the brief), *for respondent.*

JOHN J. SHEEHAN, New York, N. Y., *for intervenor.*

SMITH, *Circuit Judge*:

The Publishers' Association of New York City and individual member publishers petition to review and set aside an order of the National Labor Relations Board, issued December 21, 1965, 156 NLRB No. 16, finding that each publisher, by refusing to bargain collectively with the Union as the duly elected representative of its composing

room employees, was engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the National Labor Relations Act, as amended, 29 U. S. C. §158(a)(5) and (1), and requiring each publisher to cease refusing to bargain with the intervenor union, the New York Typographical Union No. 6, and interfering in any like or related manner with the Union's efforts to bargain with each publisher individually, to bargain on request, and to post notices. The Board cross-petitions for enforcement. We hold the Board's ruling correct, deny the petition for review, and order enforcement.

The Association and Intervenor (as well as a variety of other unions, each on its own) have a long history of multiemployer bargaining, although at times individual publishers have deserted the Association under pressure, and have made separate contracts. A multiemployer contract was effective between the petitioners and the union for the year ending March 30, 1965. But on June 26, 1964, the union notified petitioners that it desired separate contracts with each publisher. On July 21, 1964, the Association rejected this request, and has refused to negotiate contracts except on a multiemployer basis.

The Board found that the union's notice of withdrawal was timely and unequivocal, that the individual employer units were appropriate units, and that each publisher violated §8(a)(5) and (1) of the National Labor Relations Act, 29 U. S. C. §158, by refusing to bargain. The union has a majority of the employees in each individual unit.

The Board's determination was in conformity with its decision in a substantially identical case, *The Evening News Association*, 154 NLRB No. 121 (1965). There, its holding was based largely on the proposition that a multiemployer unit is a purely consensual device which em-

ployers may freely leave as long as notice is timely and unequivocal. Compare *NLRB* v. *Sheridan Creations*, 357 F. 2d 245 (2d Cir. 1966). "Mutual consent . . . is a basic ingredient necessary to support the appropriateness of a multiemployer unit." *Andes Fruit Co.*, 124 NLRB 781, 783 (1959); see also *Rayonier, Inc.*, 52 NLRB 1269 (1943); *Great Atlantic & Pacific Tea Co.*, 145 NLRB 361, enforced in relevant part, 340 F. 2d 690 (2d Cir. 1965). And the Board has not found inappropriate a unit where there was consent as evidenced by a history of multiemployer bargaining.

As for withdrawal, the Board has held that an employer may freely withdraw, subject only to the requirement that, unless there is mutual consent, notice of withdrawal must be timely and unequivocal. *Retail Associates, Inc.*, 120 NLRB 388 (1958); *Anderson Lithograph Co.*, 124 NLRB 920, 928-9 (1959), enforced sub nom. *NLRB* v. *Jeffries Banknote Co.*, 281 F. 2d 893 (9th Cir. 1960); *Detroit Window Cleaners Union*, 126 NLRB 65, 70-1 (1960), and cases cited; *Milk & Ice Cream Dealers of Greater Cincinnati*, 94 NLRB 23, 25 (1951); *York Transfer & Storage Co.*, 107 NLRB 139. This rationale had not before this case and *Evening News* been extended by the Board to an instance of union withdrawal from a multiemployer unit. Cf., however, *Retail Associates*, at 395; *NLRB* v. *Truck Drivers Local* (*Buffalo Linen*), 231 F. 2d 110, 115-6 (2d Cir. 1956), reversed 353 U. S. 87 (1957). The Supreme Court there left the question open.

The Board's position has the advantage of simplicity and of apparent equality of treatment of parties on both sides of the table. It has had little consideration in the courts, although this court in *NLRB* v. *Truck Drivers Local* (*Buf-*

falo Linen), *supra*, remarked that it would seem only fair that a union be accorded equal withdrawal privileges. As noted above, the Supreme Court expressly reserved the question, 353 U. S. 87, 94 n. 22. The arguments against the Board's position are forcefully stated by Member Brown dissenting in both *Evening News Association* and in this case.

Essentially, the Board held that since multiemployer bargaining may be initiated only on consent of the parties, it may be terminated by timely withdrawal of consent by either party. The only limitation would appear to be that the withdrawal must be genuine, that is, "unequivocal." Member Brown would hold that consent once given, and the multiemployer-union relationship once entered into, the Board has the power and duty to determine whether the aims of the Act are best served by allowing union withdrawal or forbidding it.

While the question is not wholly free from doubt, we conclude that the Board was correct in determining that the Congress did not intend to instruct it to require an unwilling union to continue in the consensual relationship if it unequivocally withdrew its consent. Denial of the right to withdraw might well discourage formation of multiemployer bargaining units for fear of being locked into a unit that might later prove antagonistic to the interests of the consenting party.

To be sure, the multiemployer bargaining unit sometimes has considerable advantages for both parties to the relationship, and particularly in fields where large numbers of small employers are typical it has been favored, and such bargaining units found appropriate. And withdrawal of a union from such a multiemployer unit relationship may have much more harmful effects on the continuing of this

type of bargaining than withdrawal of one or more employers. This may, in a situation such as the New York newspaper field we have here, substantially tilt the balances on the side of the economic power of the union against the employers. But the Congress while encouraging bargaining has not attempted to destroy the economic weapons of either party to industrial labor disputes. *NLRB* v. *Ins. Agts. Int'l Union*, 361 U. S. 477 (1960); *NLRB* v. *John Brown, et al.*, 380 U. S. 278 (1965); *American Ship Building Co.* v. *NLRB*, 380 U. S. 300 (1965). It has recognized and enforced the employees' right to self organization and collective bargaining, but left intact the right to use the economic weapons of strike and lockout when good faith bargaining fails, without authorizing the Board to put its thumb on the scales in the bargaining process.[1]

The employers fear the whipsaw strike if the bargaining must be between the individual units the Board has held appropriate and the union. We may doubt that this fear is entirely justified in view of the history of employers moving in and out of the unit here in the past, of the possibility of bargaining through the Association as designee of each employer in its individual bargaining, and of the

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[1] Studies were undertaken by a subcommittee of the House Committee on Education and Labor in the 88th Congress—see Committee print "Multiemployer Association Bargaining and Its Impact on the Collective Bargaining Process," Report of the General Subcommittee on Labor, Committee on Education and Labor, House of Representatives, 88th Congress, 2d Session.

The Committee collected many views on the general subject, and noted among other problems the question before the courts in the case and in *Evening News*. It did not reach the point of suggesting any specific legislation to the full committee, recommending instead further exploration of the subject. About all that can be drawn from the report is that the subcommittee at the time of the report was generally favorable to the continuation of multiemployer bargaining in principle.

as yet not fully explored mutual lockout possibilities even after forced dissolution of the bargaining unit.[2] In any case, requiring the Board to weigh and act on relative bargaining strength in the sense of the potential effectiveness of economic weapons available to each side, in determining appropriateness of bargaining units, would seem enough of a departure from the general scheme of the Act to call for explicit statutory provisions. This is especially so in view of the fierce debates over multiple bargaining during considerations of the Taft-Hartley amendments, and the lack of agreement thereon.[3]

Buffalo Linen suggests (353 U. S. 87, 96-7) that while the Board may, as we have held, permit withdrawal from multiemployer bargaining by certifying individual employer units, it still has a responsibility of determining the limits of the legitimate use of self-help by individual employers to meet their needs which might alternatively have been protected by multi-unit bargaining, and which they fail to obtain by good faith individual bargaining. No such question was before the Board in this proceeding, and we need not consider it here.

The other questions raised require little discussion. There is no substantial attack here on the Board's finding that single employer units are appropriate, except on the ground that the multiemployer unit is the more appropriate. It is sufficient to note that the parties agreed as to job classifications and that a plant or employer size unit is presumptively appropriate.

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[2] Cf. *Acme Markets, Inc.*, 156 NLRB No. 127, 61 LRRM 1281, and *Weyerhauser Company*, 155 NLRB No. 82, 60 LRRM 1425.

[3] See Legislative History of the Labor Management Relations Act, 1947 (G. P. O. 1948), *Labor Board* v. *Truck Drivers Union (Buffalo Linen)*, 353 U. S. 87, 95.

Finally, petitioners assert the impropriety of forcing them to face an unfair labor practice charge in order to test the appropriateness of the unit. We fail to see any distinction, however, in this respect between the situation here and the case of a new unit, and there the propriety of the procedure has long been recognized. *NLRB* v. *Burroughs Corp.*, 261 F. 2d 463 (2d Cir. 1958); *Sheridan Creations, supra*, 357 F. 2d at 248.

The petition for review is denied. The order of the Board is ordered enforced.

KAUFMAN, *Circuit Judge* (concurring):

The strife between publishers and unions in New York is old, serious and discomforting to the citizens of this city. I fear, as did the dissenting member of the Board in this and *Evening News Association*, that our decision will not alleviate and might, perhaps, exacerbate the antagonisms which have been the antithesis of labor-management peace. Thus, the history of more than 50 years of multiemployer bargaining will be disrupted upon the whim of one of the parties without any reasons assigned and with more abrasiveness sure to follow as a result.

But, I agree with my brother Smith that the solution to any inequities which result from these actions must be supplied by Congress and not this Court. It has been settled law that the Board may not concern itself with the weight of economic weapons in determining an appropriate bargaining unit or in enforcing the collective bargaining provisions of the National Labor Relations Act. Labor-management disagreements ordinarily come to an end when the economic weapon becomes intolerable for either side—with the public ire playing its subtle part in accelerating the

termination of a work stoppage. But, this weapon has been present and used in most labor disputes. If it is to be neutralized or minimized in the circumstances presented in this case, so that a consensual relationship once entered into will continue until the Board makes a determination that "the aims of the Act are best served by allowing union withdrawal or forbidding it," I believe Congress will first have to consider the problem and speak specifically on the subject.

Decree

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[SAME CAPTION]

Before:

MOORE, SMITH and KAUFMAN,

Circuit Judges.

THIS CAUSE came on to be heard upon the petition of the Publishers' Association of New York City, Hearst Consolidated Publications, Inc., Newspaper Enterprises, Inc., Long Island Daily Press Publishing Co., New York World Telegram Corp., News Syndicate Co., Inc., and The New York Times Company, to review and set aside a certain order of the National Labor Relations Board issued against petitioners, on December 21, 1965, and upon cross-petition of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on May 31, 1966, and has considered the briefs and the transcript filed in this cause. On July 25, 1966, the Court being fully advised in the premises, handed down its decision enforcing the order of the National Labor Relations Board.

ON CONSIDERATION WHEREOF, it is ordered, adjudged and decreed by the United States Court of Appeals for the Second Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that the above-named petitioners, their respective officers, agents,

successors, and assigns abide by and perform the directions of the Board in said order contained.

LEONARD P. MOORE
Judge, United States Court of Appeals for the Second Circuit

J. JOSEPH SMITH
Judge, United States Court of Appeals for the Second Circuit

Filed: August 26, 1966.

Petition for Stay of Mandate

[SAME CAPTION]

Before:

MOORE, SMITH and KAUFMAN,
Circuit Judges.

Motion to recall decree and stay its reissuance GRANTED, subject to the provisions of Rule 28(c) of this Court.

LPM
JJS
IRK
U.S.C.J.J.

September 8, 1966

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. C., Secs. 151, *et seq.*) are as follows:

Definitions

Section 2. When used in this Act—

(2) The term 'employer' includes any person acting as an agent of an employer directly or indirectly, . . .

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Rights of Employees

Section 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Unfair Labor Practices

Section 8(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

• • • • •

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization;

* * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

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(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

* * * * *

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

* * * * *

(d) For the purpose of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession:

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REPRESENTATIVES AND ELECTIONS

Section 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment:

• • • • •

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof:

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LIMITATIONS

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Section 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

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